Supreme Court, U.S.
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No. 01-___

In The

Supreme Court of the United States

JIMMY SEARLES,

Petitioner,

v.

DURWARD A. VAN BEBBER, Administrative Chaplain, Hutchinson Correctional Facility,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

How should the three-way split among the circuit courts regarding the scope of 42 U.S.C. § 1997e(e) be resolved? Specifically, does the Prison Litigation Reform Act's prohibition of damages for mental and emotional injuries in the absence of an accompanying physical injury, as codified at 42 U.S.C. § 1997e(e), reach violations of intangible constitutional rights, such as First Amendment religious freedoms? Do not constitutional concerns require that 42 U.S.C. § 1997e(e) be narrowly construed as inapplicable to First Amendment claims?

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OPINION BELOW

The May 14, 2001 decision of the United States Court of Appeals for the Tenth Circuit is reported at 251 F.3d 869, and is included in the petition appendix. The Judgment from the District Court and the jury's Verdict from the District Court are also included in the appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision in this case on May 14, 2001, and it denied a timely petition for rehearing en banc on August 2, 2001. This petition has been filed within ninety days of the latter date, as required by Supreme Court Rule 13.1.

FEDERAL STATUTE INVOLVED

The Prison Litigation Reform Act, at 42 U.S.C. § 1997e(e), provides that

> "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

STATEMENT OF THE CASE

1. *Nature of the Suit.* This case involves the efforts of a Jewish inmate, Jimmy Searles, at the Hutchinson, Kansas state correctional facility, to vindicate his First Amendment right to freely exercise his religion and follow a kosher diet. For a period of approximately two months, Durward Van Bebber, the chaplain at the Hutchinson correctional facility, denied Searles this right to a kosher diet. Van Bebber did so despite Searles's repeated formal, written and properly-submitted requests for kosher meal – requests in which Searles informed Van Bebber that he had already been practicing Judaism and receiving kosher diet at his two previous Kansas correctional facilities in El Dorado, Kansas and Lansing, Kansas. Van Bebber never bothered to pick up a phone, call the El Dorado and Lansing facilities, and confirm this verifiable history of Searles's receiving kosher diet. Nor did he bother to look for the Change of Religion Request Form sitting in Searles's central file. It was not until Searles appealed a grievance all the way to the Kansas Department of Corrections ("KDOC") in Topeka and KDOC actually investigated and found Searles's representations to be true that Searles's kosher diet requests were finally granted.

2. *The District Court.* Searles filed the present action under 42 U.S.C. § 1983 alleging that Van Bebber and two other defendants, a warden and deputy warden, deprived him of his First Amendment right to the free exercise of his religion. Searles sought injunctive relief, compensatory damages for the months during which he was wrongfully denied kosher diet, nominal and punitive damages, and vindication of his constitutional rights.

Operating *pro se*, Searles managed to survive summary judgment on the issue of qualified immunity. The District Court then appointed counsel to represent Searles through formal discovery and jury trial.

After a three-day trial, the jury found Van Bebber liable for intentionally depriving Searles of his First Amendment right to practice his religion. Petition Appendix ("Pet. App.") at 24. The jurors did not find that Searles had suffered any physical injury as a result of this deprivation, but awarded $3,650 in actual damages for mental and emotional injuries. Pet. App. at 24-25. (Because they had awarded actual damages for mental and emotional injuries, the jury did not consider the question of nominal damages. Pet. App. at 26.) The jury then moved to the question of punitive damages and, upon finding that Van Bebber had acted with reckless indifference to Searles's right to exercise his religion, assessed $42,500 in punitive damages against Van Bebber. Pet. App. at 27.

The District Court entered judgment in accordance with the jury's verdict. Pet. App. at 29-30. Van Bebber did not file a motion for judgment as a matter of law or for a new trial in the District Court, but proceeded directly with an appeal to the Tenth Circuit on a number of different issues.

3. *The Tenth Circuit*. The Tenth Circuit affirmed in part and vacated in part the jury's verdict, and it remanded the case for further proceedings. Pet. App. at 22. The Tenth Circuit rejected outright Van Bebber's arguments that the jury's verdict (including the award of punitive damages) was not supported by the evidence

and that certain evidence should not have been excluded. Pet. App. at 12-21. But the Tenth Circuit found that the award of actual damages for mental and emotional injuries unaccompanied by physical injury was barred by the aforementioned provision in the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e). Pet. App. at 7-12. The Tenth Circuit, therefore, vacated the award of actual damages and converted it to an award of one dollar in nominal damages. Pet. App. at 15, 22. Moreover, because the District Court's jury instruction on punitive damages "specifically instructed" the jury "to consider the amount of actual damages in determining the amount of punitive damages to be awarded," the Tenth Circuit also vacated the punitive damages award and remanded the case for a new trial solely on the issue of the amount of punitive damages. Pet. App. at 22. The Tenth Circuit rejected Searles's arguments that § 1997e(e) had no application to his First Amendment claim.

Challenged here is the Tenth Circuit's ruling that the Prison Litigation Reform Act – specifically, 42 U.S.C. § 1997e(e) – has any application to this First Amendment case. The Tenth Circuit ruled that § 1997e(e) bars recovery of damages for mental and emotional injuries (without a physical injury) in all prisoner litigation, including First Amendment cases. *See* Pet. App. at 8-11. Section 1997e(e) should not be interpreted to prohibit an inmate who has been denied religious liberties or other First Amendment rights from fully vindicating those rights and liberties, including through the recovery of actual damages for mental and emotional injuries suffered.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's Decision Provides This Court With An Opportunity To Consider The Scope And Meaning Of 42 U.S.C. § 1997e(e) And Resolve A Developing Three-Way Split Among The Circuit Courts

Section 1997e(e), along with the rest of the Prison Litigation Reform Act, is a relatively new statute which became effective April 26, 1996, mere months before Plaintiff filed this lawsuit. Since its effective date, "courts have had difficulty in determining the precise scope of section 1997e(e) and do not always agree on the statute's reach." *Mason v. Schriro*, 45 F. Supp. 2d 709, 716 (W.D. Mo. 1999) (discussing thoroughly the differing treatments of the statute and determinations of its scope). Presently, a three-way split among the circuit courts appears to have developed regarding the meaning and application of § 1997e(e), especially to First Amendment and other similar constitutional claims.

First, the Ninth Circuit has held that § 1997e(e) has no application to First Amendment claims "regardless of the form of relief sought." *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998). Several district courts have followed this interpretation or independently arrived at a similar one. *See, e.g., Shaheed-Muhammad v. Dipaolo*, 138 F. Supp. 2d 99, 110 (D. Mass. 2001) (holding that the § 1997e(e) "limitation on recovery" is "simply not applicable" to First Amendment and similar claims that do not involve a physical injury as the element of the claim); *Cancel v. Goord*, No. 00 Civ. 2042, 2001 WL 303713, at *8 (S.D.N.Y. Mar. 21, 2001) ("The plain language of the statute does not prohibit a plaintiff's First Amendment claim.");

Amaker v. Haponik, No. 98 CIV. 2663(JGK), 1999 WL 76798, at *7 (S.D.N.Y. Feb. 17, 1999) ("The injury occasioned by a violation of a plaintiff's First Amendment rights is not a 'mental or emotional' injury in the same sense as [Eighth Amendment-like] injuries."); *Self-Allah v. Annucci*, No. 97-CV-607(H), 1998 WL 912008 (W.D.N.Y. Oct. 14, 1998) (Courts have upheld the physical injury requirement of § 1997e(e) when the underlying claim involves an injury to a prisoner's physical being. However, this standard is inapplicable when a prisoner makes a First Amendment claim."); *Warburton v. Underwood*, 2 F. Supp. 2d 306, 315 (W.D.N.Y. 1998) ("[T]he Court declines to dismiss the Establishment Clause claim under 42 U.S.C. § 1997e(e) despite the fact that the only injury plaintiff could experience as a result of a constitutional violation under the Establishment Clause would be mental or emotional."). Some courts have reached similar conclusions when applying § 1997e(e) to Fourth and Fourteenth Amendment claims. *See, e.g., Friedland v. Fauver*, 6 F. Supp. 2d 292, 309-10 (D.N.J. 1998) (involving Fourth Amendment claim) (reasoning that the plaintiff was not really "seeking damages for mental or emotional injury" but "damages for unconstitutional incarceration resulting from his arrest without probable cause"); *Mason, supra*, 45 F. Supp. at 719 ("The court will not adopt an interpretation that gives rise to serious constitutional problems and will adopt a narrower interpretation of section 1997e(e) under which the statute does not apply to Fourteenth Amendment equal protection claims.").

Second, the Seventh Circuit has held that 1997e(e)'s bar on damages "is applicable only to claims for mental or emotional injury, [and] [i]t has no application to a

claim involving another type of injury," including claims for nominal or punitive damages independent of actual damages claims for mental or emotional injury. *Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999); *see also Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999) (holding that "[a] deprivation of First Amendment rights standing alone is a cognizable injury.") (applying the *Robinson* decision in a First Amendment context and holding that section 1997e(e) does not bar claims for nominal damages where such relief was sought solely for the First Amendment violation). The Third Circuit follows a similar approach. *Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000); *Doe v. Delie*, 257 F.3d 309, 314 & n.3 (3rd Cir. 2001).

Finally, the D.C. Circuit has held that § 1997e(e) bars both actual and punitive damages in any case in which an inmate has suffered a constitutional deprivation that did not lead to a physical injury. *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (holding that "§ 1997e(e) draws no such distinction" between actual and punitive damages and that "Congress's evident intent would be thwarted if prisoners could surmount § 1997e(e) simply by adding a claim for punitive damages"). The D.C. Circuit left open the possibility that § 1997e(e) might not bar nominal damages, reasoning that a "nominal" award might be permissible because "prisoners are presumably a good deal less likely to embark on a lawsuit if there is no prospect of a pecuniary award." *Id.* at 1349.

In the present case, the Tenth Circuit followed the trail blazed by the Seventh Circuit in *Robinson* and took a middle-ground approach, allowing claims for nominal

and punitive damages when an inmate suffers no physical injury, but disallowing any actual damages for mental and emotional injuries the inmate sustains. The Tenth Circuit struck Searles' claim for actual damages but allowed claims for nominal and punitive damages. Searles respectfully submits that this middle-ground approach is not a tenable interpretation of the statute.

A. Section 1997e(e) Does Not Apply To "Actions For" Vindication Of An Intangible Constitutional Right.

By its own terms, § 1997e(e) bars only actions for mental and emotional injury. *See Perkins v. Dep't of Corrections*, 165 F.3d 803, 808 n.6 (10th Cir.1999) ("The plain language of § 1997e(e) applies only to actions 'for mental or emotional injury.' ") (emphasis added). Section1997e(e) does not say that it bars "damages" for mental or emotional injuries or that it bars "mental or emotional relief." Instead, it says that it bars "actions for" mental or emotional injuries, without a prior showing of physical injury.

Section 1997e(e) does not bar any damages – including actual, nominal or punitive damages – in an "action for" vindication of intangible First Amendment rights. Significantly, unlike First Amendment claims, other types of constitutional claims, particularly Eighth Amendment claims, require some kind of showing of actual injury as an element of proof. The substantive nature of the two claims is different; specifically, one is a claim requiring proof of actual injury, and the other is not. This distinction makes all the difference. *See Mason*, 45 F. Supp. 2d at 717 (finding that § 1997e(e) should be applied based upon

the "substantive nature of the underlying claim" and not the "relief requested," comparing and contrasting First and Fourteenth Amendment claims with Eighth Amendment claims in this regard, and examining the legislative history of § 1997e(e)); *see also Canell*, 143 F.3d at 1213 ("§ 1997e(e) does not apply to First Amendment claims regardless of the form of relief sought"); *Amaker*, 1999 WL 76798, at *7 ("The injury occasioned by a violation of a plaintiff's First Amendment rights is not a 'mental or emotional' injury in the same sense as [Eighth Amendment-like] injuries."). Actions for the types of constitutional violations that require proof of an actual injury are "actions" that fall within § 1997e(e). *See Mason*, 45 F. Supp. 2d at 716 (noting that § 1997e(e) "has been applied with least difficulty in the Eighth Amendment context"). First Amendment claims are not.

This analysis is supported by the considered reasoning of the United States District Court for the District of Massachusetts in *Shaheed-Muhammad v. Dipaolo, supra*, 138 F. Supp. 2d 99 (D. Mass. 2001). In *Shaheed-Muhammad*, the defendants denied a devout inmate a vegetarian diet, something central to his particular faith. The prisoner sued for violation of his First Amendment right to free exercise of his religion, as well as due process and equal protection violations, but alleged no physical injury in his complaint. The defendants, relying upon 42 U.S.C. § 1997e(e), filed a motion for judgment on the pleadings.

The Massachusetts federal court denied the defendants' motion, holding that § 1997e(e) did not "reach" the action asserted:

> The core of the dispute concerns the scope of the Prisoner Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(e), an act intended to limit access to the federal courts for certain prisoner claims, namely those for emotional distress unaccompanied by physical harm. I conclude that the provision does not cover the claims alleged by Muhammad because the harms proscribed by the First Amendment, Due Process, or Equal Protection are assaults on individual freedom and personal liberty, even on spiritual autonomy, and not on physical well-being. Intangible rights like these are abridged the moment a state silences free speech or prevents a citizen from following the precepts of his religion. While the violation may be accompanied by psychological or even physical injury, the severity of incursion is not necessarily measured in those terms.

Id. at 101. More precisely, the court held:

> Where the harm that is constitutionally actionable *is* physical or emotional injury occasioned by a violation of rights, § 1997e(e) applies. In contrast, where the harm that is constitutionally actionable is the violation of intangible rights – regardless of actual physical or emotional injury – section 1997e(e) does not govern.

Id. at 107.

The court reasoned that "the language" of the statute bars only "an action 'for' emotional damages suffered while in custody, unaccompanied by a physical injury," and that the constitutional violations alleged by the Muslim prisoner were "not actions 'for' emotional distress." *Id.* The court summarized:

> Muhammad's First Amendment, Equal Protection, and Due Process claims, in short, are claims for violations of abstract rights. While their violation may be accompanied by emotional or even physical injury, an action under § 1983 is not brought to redress such harms.

Id. at 108. As the court further noted toward the end of its opinion, the First Amendment violation occurred before and regardless of physical injury:

> Muhammad's rights were violated at the precise moment when Massachusetts DOC officials allegedly denied him access to his dietary needs and religious articles, rather than when these deprivations later resulted in emotional, psychological, or physical harm. For these reasons, the § 1997e(e) limitation on recovery is simply not applicable to Muhammad's allegations.

Id. at 110.

The court specifically noted that First Amendment claims were not concerned with the nature of any injury, but the nature of the right being infringed:

> The First Amendment, for example, is not concerned with preventing physical abuse by government agents, but rather with the invasion of the "sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). When government proscribes free inquiry, thought, or discourse, when it forecloses or impedes the right to publish, distribute, or read, or when it intentionally favors one religion over

> another, it violates the amorphous rights secured under the First Amendment irrespective of resulting physical injury. *E.g., City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (ordinance banning all residential signs violates the First Amendment); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (First Amendment rights of applicants for public employment are breached when they are rejected on the basis of political affiliation).

Id. at 108.

The court also considered the legislative history behind § 1997e(e) and, based on that history, arrived at a statutory interpretation similar to that advocated by Plaintiff herein. The United States Senators who sponsored § 1997e(e) discussed its impact exclusively in terms of Eighth Amendment-like "conditions of confinement" claims. These types of claims differ significantly from a First Amendment claim. For example, compare a prisoner complaint about the absence of creamy peanut butter on the salad bar (which would be an Eighth Amendment "condition of confinement" claim requiring proof of actual injury – and which is one of the examples of frivolous prisoner litigation offered by Senator Hatch) with a prisoner complaint regarding the denial of a religious-based special dietary requirement (a First Amendment claim not requiring any proof of actual injury – and the basis of this action). The Massachusetts federal court found these two types of claims "qualitatively different":

> . . . the interpretation I advance is consistent with the legislative history and purposes of the PLRA. The Prison Litigation Reform Act was

> passed by Congress as a rider to the Omnibus Consolidated Rescission and Appropriations Act of 1996 and signed into law by President Clinton on April 26, 1996. It was intended to reduce frivolous prisoner litigation about conditions of confinement and conserve scarce judicial resources. In testifying in support of the litigation, Senator Orrin Hatch claimed that the PLRA would "help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits." Senator Bob Dole argued that Congress needed to curtail "[f]rivolous lawsuits filed by prisoners [that] tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population," considering that the number of lawsuits filed by prisoners concerning prison conditions had risen from 6,000 in 1975 to 39,000 in 1994.
>
> But while the PLRA dramatically curtailed the litigation options available to prisoners, it was not its purpose to insulate from review all claims in which legitimate constitutional issues predominate without accompanying physical harm. 28 U.S.C.A. §§ 1915(g). Plainly, claims of racial discrimination or the infringement of religious freedoms in the prison setting are qualitatively different from lawsuits seeking damages for "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety."

Id. at 108-09.

Plaintiff respectfully submits that the analysis of the Massachusetts federal court, consistent with the Ninth

Circuit's decision in *Canell*, is sound and persuasive and should be followed by this Court.

B. Section 1997e(e) Should Be Narrowly Construed As Inapplicable To First Amendment Claims.

Other courts have reasoned that § 1997e(e) is ambiguous and, therefore, should be narrowly construed as inapplicable to First Amendment claims. In *Mason v. Schriro, supra*, 45 F. Supp. 2d 709 (W.D. Mo. 1999), the court closely analyzed the "for mental or emotional injury" language in § 1997e(e) and concluded that it was ambiguous:

> Section 1997e(e) is not entirely clear because the phrase "for mental or emotional injury" can reasonably be construed to mean two different things. "for mental or emotional injury" can be construed to mean "for [violations of constitutional or statutory rights that result in a request for relief for] mental or emotional injury." This first construction might appear to be the most straight-forward construction. If the statute were construed in this way, however, it would be quite sweeping in its reach because, under such a construction, all claims for damages, even claims for damages for equal protection violations and First Amendment free exercise violations would be barred if the only injury alleged was mental and emotional suffering. As will be discussed below, such a construction raises serious constitutional concerns.
>
> The phrase "for mental or emotional injury" can also be construed more narrowly to mean "for [inflictions of] mental or emotional injury

> [where the infliction of mental or emotional distress is alleged to constitute the violation of plaintiff's constitutional or statutory rights]." Under this construction of section 1997e(e), the underlying substantive claim involves infliction of mental or emotional distress or some claim that defendants' actions placed plaintiff in great fear or distress for his safety and welfare. Under the first, more expansive construction of section 1997e(e), by contrast, the focus is on the relief requested rather than on the substantive nature of the underlying claim.

Id. at 717. The court then set forth a rationale favoring the more "narrow construction" of the statute. Drawing the aforementioned distinction between those types of constitutional claims for which actual damages is not an element, and those types of constitutional claims – chiefly, Eighth Amendment claims – for which the element of "injury" is critical, the court stated:

> The elements of the underlying claim may have little to do with mental or emotional injury. Thus, for example, to state a First Amendment free exercise claim, a Fourteenth Amendment equal protection claim, or a Fourteenth Amendment due process claim, a plaintiff is not required to make any showing of mental or emotional harm, in order to state a claim. By contrast, under the narrow construction of section 1997e(e), the underlying substantive claim involves a claim of injury to plaintiff's emotional well-being.
>
> The narrow construction of section 1997e(e) would bring section 1997e(e) squarely within an Eighth Amendment context and is consistent with the caselaw in that section 1997e(e) is most

> frequently applied in contexts where plaintiffs allege emotional distress because of deliberate indifference to their welfare and safety.

Id. Cementing its decision to adopt a narrow construction of § 1997e(e), the court turned to two time-honored aids for resolving statutory ambiguities: (1) legislative history; and (2) canons of statutory construction. *Id.* at 717-20.

Regarding legislative history, the *Mason* court, reasoning as follows, concluded that a narrow construction was consistent with Congress' intent:

> [T]he legislative history indicates that Congress was concerned about frivolous lawsuits by inmates arising from their conditions of confinement – frivolous complaints about such prison conditions as the quality of prison food, prison amenities and physical facilities. There is nothing in the legislative history to suggest that Congress intended to dramatically limit available judicial remedies for such historically actionable claims as Fourteenth Amendment equal protection and First Amendment free exercise claims. Given the overall purpose of the PLRA to curb frivolous lawsuits, and the legislative history showing that allegations of prison legislation abuses were focused primarily on conditions of confinement, it does not appear that Congress intended to give a broad grant of immunity to prison officials in situations where inmates are able to establish blatant racial or religious discrimination. For example, if minority inmates were systematically assigned to poorer facilities, or had far fewer amenities or were afforded poorer educational opportunities than white inmates, or if members of a non-Christian religion, in contrast to members of a

> Christian religion, were systematically denied any opportunity to practice their religion, it is highly unlikely that Congress would have intended section 1997e(e) to preclude a damages remedy because the inmates could not show physical injury, but could only show mental or emotional injury. Given the legislative focus on frivolous lawsuits relating to conditions of confinement, and the absence of any discussion showing that Congress intended to dramatically restrict judicial remedies for violations of such constitutional rights as Fourteenth Amendment equal protection rights, it does not appear likely that Congress intended an expansive interpretation of section 1997e(e) – one that would disturb the existing and well-settled constitutional jurisprudence relating to Fourteenth Amendment equal protection claims.

Id. 718-19.

Regarding the canon of statutory construction, this Court has routinely applied the canon that statutes should be interpreted to avoid constitutional questions. *See Regan v. Time, Inc.*, 468 U.S. 641, 697, 104 S. Ct. 3262, 3292 (1984) (Stevens, J., concurring in judgment in part and dissenting in part). The Tenth Circuit's interpretation and application of § 1997e(e) raises such questions. *See* Stacey Heather O'Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 Va. L. Rev. 1189, 1216 (1997) ("If [§ 1997e(e)] leaves state prisoners with no remedy for certain constitutional violations, it raises 'serious questions' of constitutional law.") The core intent of the First Amendment "was to withdraw certain subjects from the vicissitudes of political

controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Educ.*, 319 U.S. 624 (1943). These constitutional concerns led the *Mason* court to adopt a narrow interpretation of § 1997e(e):

> If the court were to interpret section 1997e(e) to apply in cases where prisoners alleged blatant racial or religious discrimination, there would be grave constitutional concerns because inmates would be severely restricted in the type of remedies they could seek for egregious equal protection violations. . . .
>
> The court is mindful of the doctrine that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 628-29, 113 S. Ct. 2264, 2282-83, 124 L. Ed. 2d 539 (1993). If the court were to construe section 1997e(e) to preclude relief for Fourteenth Amendment equal protection claims because inmates could only show mental and emotional injury and could not show physical injury, serious constitutional concerns would be implicated. The court would, in effect, interpret section 1997e(e) as granting prison officials immunity from suit even where there is blatant and systematic racial or religious discrimination. . . . [T]he court would adopt an interpretation of section 1997e(e) under which the

> availability of judicial remedies for the violations of constitutional rights would be restricted to the point where Congress would in essence be taking away the rights themselves by rendering them utterly hollow promises.
>
> The court will not adopt an interpretation that gives rise to serious constitutional problems and will adopt a narrower interpretation of section 1997e(e) under which the statute does not apply to Fourteenth Amendment equal protection claims.

Id. at 719.

Searles respectfully submits that the Court should follow the well-articulated reasoning of the *Mason* court and narrowly construe § 1997e(e) as inapplicable to the present case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JIMMY SEARLES, Plaintiff-Appellee, v. DURWARD A. VAN BEBBER, Administrative Chaplain, Hutchinson Correctional Facility, Defendant-Appellant.	)	Nos. 99-3076 & 99-3279
UNITED STATES OF AMERICA, Intervenor-Amicus Curiae.	)	

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. CV-96-3515-KHV)

(Filed May 14, 2001)

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John C. Hoyle, Attorney, Appellate Staff, Department of Justice, Washington, D.C., (David W. Ogden, Acting Assistant Attorney General, Jackie N. Williams, United States Attorney and Barbara L. Herwig, Attorney, Appellate Staff, with him on the brief) for Intervenor-Amicus Curiae.

Before **BRORBY, HOLLOWAY** and **BRISCOE**, Circuit Judges.

HOLLOWAY, Circuit Judge.

Plaintiff-appellee Searles, an inmate at the Hutchinson Correctional Facility of the State of Kansas (HCF), sued several prison officials alleging the defendants had violated his First Amendment right to free exercise of religion by denying him approval for a kosher diet. Defendant VanBebber, the chaplain at HCF, appeals from a jury verdict against him. The jury found no liability on the part of the other two defendants, who were the warden and the deputy warden at HCF.

I

A

Plaintiff Searles had been in the Kansas prison system since 1989 and had originally listed his religious preference as Baptist. In August 1995, plaintiff was transferred from HCF to the facility in El Dorado. Within two weeks after his arrival at El Dorado, plaintiff filed a change of religion form, declaring that he had converted to Judaism. Plaintiff requested at that time that he be placed on the "Jewish call out"[1] and also requested a kosher diet. Plaintiff's requests were immediately granted by the El Dorado chaplain, even though under the applicable regulations of the Kansas Department of Corrections, an inmate wishing to join a religious group other than that which was his original preference may be required to participate in the "new" group for a period of three months to demonstrate the sincerity of his request before being permitted "to perform the practices deemed essential by the chosen religious affiliation," such as adherence to a particular diet. II Aplt. App. 466, 468.

In March 1996, plaintiff was transferred from El Dorado to the facility at Lansing. As he had done at El Dorado, he promptly requested placement on the Jewish call out and a kosher diet. As with El Dorado, the requests were promptly granted at Lansing.

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[1] Both parties in their briefs use the term "call out" without explanation. From the context provided by the trial testimony, however, it seems reasonably clear that the term refers to the list of inmates who are permitted to attend certain events, such as a particular religious service.

On June 12, 1996, plaintiff was transferred back to HCF and, on arrival, requested a kosher diet. He did not request placement on the Jewish call out. He testified at trial that this was because he believed there was no Jewish group at HCF. Plaintiff's request was denied by defendant's predecessor because plaintiff was not on the "Jewish call-out." II Aplt. App. 446. Defendant's predecessor did send plaintiff a Request for Accommodation of Religious Practice form; apparently this form was the recognized vehicle for making a request like the one plaintiff had made. Plaintiff partially filled out the form and submitted it with a request for a supplemental diet, explaining that there were few kosher items available in the prison store. This form also stated that he had been on a kosher diet since September 1995. *Id.* at 447-49.

Plaintiff submitted a third request two months later, by which time the former chaplain had retired and defendant VanBebber had become the HCF chaplain. In this form, plaintiff noted that he had been on a kosher diet at both El Dorado and Lansing. In preparing to respond, defendant VanBebber called the El Dorado facility where plaintiff had proclaimed his Jewish faith a year earlier. The defendant did not, however, ask if plaintiff had been given a kosher diet at El Dorado; the defendant testified that had he been told that plaintiff had been getting a kosher diet for nine months before his arrival in Hutchinson, he would have approved the request. The defendant also looked in plaintiff's file, which indicated that plaintiff was Protestant. Apparently the defendant failed to look for the change of religious preference form which plaintiff had filed at El Dorado and which was in his file at HCF, nor did the defendant notice the two previous

requests for a kosher diet. The defendant informed plaintiff that he would be placed on the Jewish call out and sent plaintiff another form to request religious accommodation, with this note: "Please explain your reasons for requesting a Jewish Kosher Diet at this time as you have been at HCF since June 12, 1996." *Id.* at 450.

Again plaintiff partially filled out the form and noted his history of having the kosher diet. Plaintiff also noted that he had requested the kosher diet promptly on his arrival at HCF in June but this had been denied. Defendant chaplain rejected the request and required plaintiff to be "active in the Jewish Group" for 90 days to be eligible for the kosher diet. *Id.* at 453.

Plaintiff filed an administrative grievance, which was assigned to the defendant. The defendant filed a report with the warden which did not mention plaintiff's statements that he had been on a kosher diet for nine months before coming to HCF. The warden denied the grievance, and plaintiff appealed to the state corrections department. The DOC investigated, found that plaintiff had been on a kosher diet at the two previous facilities, and recommended that his request be granted. On receiving that report, the deputy warden looked at plaintiff's file; apparently this was the first time that anyone at HCF found the change of religion form that plaintiff had completed at El Dorado and which had been in his file all along. Plaintiff's request was then granted. That decision was made on October 18, 1996, but not communicated immediately. Plaintiff began receiving a kosher diet on October 28, 1996, but four days before that he had mailed his *pro se* complaint to the district court, which was filed on October 30, 1996. I(A) Aplt. App. 92-93.

B

Plaintiff named as defendants Warden Robert Hannigan and Deputy Warden Steven Dechant, as well as appellant VanBebber, in his *pro se* complaint. The defendants' answer was filed in April 1997, along with a *Martinez* report.[2] Defendants promptly moved for summary judgment on several grounds. In a published order, the district judge determined that: plaintiff had shown the existence of a genuine issue of fact as to the sincerity of his religious beliefs, and defendants were not entitled to summary judgment on that basis; plaintiff had failed to show any facts to support his equal protection claim, and defendants were entitled to partial summary judgment on that claim; the complaint would be construed as a suit against the defendants in their individual capacities, and thus Eleventh Amendment immunity would not shield the defendants; and defendants had not shown they were entitled to qualified immunity. *Searles v. VanBebber*, 993 F. Supp. 1350 (D. Kan. 1998).

Counsel was appointed to represent plaintiff in June 1998, after the court's ruling on the summary judgment motion. The case went to trial in February 1999. The jury found in favor of the warden and the deputy warden, but found defendant liable and assessed compensatory damages of $3,650, as well as $42,500 in punitive damages against him. The court later awarded attorney's fees, *Searles v. VanBebber*, 64 F. Supp. 2d 1033 (D. Kan. 1999), which is the subject of the second of the instant related appeals. Of particular importance to the appeal of the

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[2] *See Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978).

underlying damages awards, the district judge instructed the jury that they could consider damages for mental and emotional injuries and struck from the instruction language proposed by the defense that would have made such damages contingent on a finding of physical injury. We turn to that ruling which is appealed.

II

A

Defendant contends that the jury award of compensatory damages must be vacated because the jurors found no physical injury, only "mental and emotional injuries" in the words of the verdict form, and such recovery in the absence of physical injury is said to be barred by the Prison Litigation Reform Act of 1996 (PLRA), specifically 42 U.S.C. § 1997e(e).

Plaintiff argues that defendant has waived this PLRA issue because such a limitation on the available remedy constitutes an affirmative defense which must be pleaded in the answer; the defense was not pleaded in the answer, nor asserted in the pretrial order issues nor in defendant's motion for summary judgment. Defendant replies that the omission from the answer and the pretrial order occurred because plaintiff had not specifically requested such damages in the complaint or in the pretrial order.

Under the circumstances of this case we conclude that there was no waiver of the section 1997e(e) defense; we therefore need not decide whether this is an affirmative defense subject to waiver. Our review of the record reveals that defendant is correct in saying that plaintiff

did not specifically plead, nor include in the pretrial order, a claim for mental and emotional damages. Thus, defendant can hardly have been expected to have raised defenses to this claim in the pleadings or the pretrial order. When defendant raised the issue at trial, by objecting to the instruction given by the court, the district judge did not indicate that her decision was based on waiver; rather, she clearly appears to have overruled the objection on the merits. I(A) Aplt. App. 367-68. We find no waiver of this section 1997e(e) issue and turn to its merits.

B

"We review the district court's decision to give a particular jury instruction for abuse of discretion and consider the instructions as a whole *de novo* to determine whether they accurately informed the jury of the governing law." *United States v. McClatchey*, 217 F.3d 823, 834 (10th Cir.), *cert. denied*, 121 S. Ct. 574 (2000). The issue presented here is clearly a legal issue and thus our review is plenary.

Defendant relies on section 803(d) of the PLRA, which provides:

> No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

42 U.S.C. § 1997e(e). We note that the jury in this case did not find by a preponderance of the evidence that Defendant VanBebber caused physical injury to the Plaintiff. I(A) Aplt. App. 14.

Defendant contends that section 1997e(e) is a clear prohibition of the type of recovery awarded by the jury here. Plaintiff argues that the statute is ambiguous and should be construed to have no effect on First Amendment claims like his. We note that there are decisions which support, in varying degrees, plaintiff's argument against the application of section 1997e(e) to bar compensatory damages on plaintiff's free exercise claim. *See, e.g., Shaheed-Muhammad v. Dipaolo,* ___ F. Supp. 2d ___ 2001 WL 311233 (D. Mass. 2001); *Mason v. Schriro,* 45 F. Supp. 2d 709, 715-21 (W.D. Mo. 1999); *Warburton v. Underwood,* 2 F. Supp. 2d 306, 315 (W.D.N.Y. 1998); *Self-Allah v. Annucci,* 1998 WL 912008 (W.D.N.Y. 1998).

For example in *Mason,* an equal protection claim was asserted based on allegations of a practice of considering race in temporary housing assignments in the state prison. In discussing the applicability of the limitations of section 1997e(e), the court adopted a narrow interpretation of the statute. Under that narrow construction, the statute was held inapplicable to claims of denial of equal protection rights. Plaintiff urges that the rationale of *Mason* would lead to a conclusion that the statute is likewise inapplicable to his First Amendment claim. It noted that a broader interpretation of section 1997e(e) would involve the denial of judicial remedies to the point "where Congress would in essence be taking away the rights themselves by rendering them utterly hollow promises." 45 F. Supp. 2d at 719. Therefore the court determined that the statute was not applicable there so as to preclude the plaintiff from proceeding on his claim for compensatory damages. *Mason* further held that even if section 1997e(e) were held to bar claims for compensatory

damages for mental and emotional injury in plaintiff's circumstances, the statute was not applicable to bar plaintiff's claims for nominal damages. 45 F. Supp. 2d at 720. *Mason* said the reasoning of *Memphis Community School District v. Stachura*, 477 U.S. 299, 308 (1986), was instructive on the nominal damages question. *Mason* said that in *Stachura, id.* at 308-09, the Court held that nominal damages rather than damages based on some "undefinable value" of infringed rights are the appropriate means of vindicating rights whose deprivation has not caused actual, provable injury.

Support for plaintiff's argument is provided by the analysis in other opinions, particularly *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998). *Canell*, like the instant case, involved an alleged infringement of an inmate's free exercise rights. The Ninth Circuit there rejected an argument that section 1997e(e) barred Canell's action because he was alleging only "mental or emotional injury," without the requisite physical injury. The Ninth Circuit disagreed, stating:

> *Canell is not asserting a claim for "mental or emotional injury." He is asserting a claim for a violation of his First Amendment rights.* The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment claims regardless of the form of relief sought.

143 F.3d at 1213 (emphasis added and footnote omitted). A similar result was reached in *Amaker v. Haponik*, 1999 WL 76798 (S.D.N.Y. 1999) ("the injury occasioned by a

violation of a plaintiff's First Amendment right is not a 'mental or emotional' injury in the same sense as in common tort law.").

We disagree with the reasoning in *Mason* and *Amaker* which would make application of the statute contingent on the nature of the plaintiff's allegedly infringed rights. We are persuaded instead that section 1997e(e) should be held to apply in the instant case because of its plain language.[3] The plain language of the statute does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted. The underlying substantive violation, like Canell's First Amendment wrong, should not be divorced from the resulting injury, such as "mental or emotional injury," thus avoiding the clear mandate of § 1997e(e). The statute limits the remedies available, regardless of the rights asserted, if the only injuries are mental or emotional. *See Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999).

Plaintiff contends that if the scope of the statute is not narrowed as it was in *Mason* and *Amaker*, the statute would unconstitutionally infringe on plaintiff's right of access to the courts. We disagree with plaintiff and instead agree with other decisions holding that the statutory restriction of section 1997e(e), barring damages for mental and emotional injuries in the absence of physical injury, does not violate the inmate's due process rights

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[3] We note that in the context of an Eighth Amendment claim, in *Perkins v. Kansas Department of Corrections*, 165 F.3d 803 (10th Cir. 1999), we held that § 1997e(e) applied, but we have not decided the question of the statute's applicability in a First Amendment case like this.

conferred by the Fifth Amendment. *See Harris v. Garner*, 190 F.3d 1279, 1289 (11th Cir. 1999), *reh'g en banc granted and opinion vacated*, 197 F.3d 1059 (11th Cir. 1999), *opinion reinstated in pertinent part en banc*, 216 F.3d 970 (11th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3259 (Sept. 25, 2000); *Davis v. District of Columbia*, 158 F.3d 1342, 1345-48 (D.C. Cir. 1998). "[T]he Constitution does not demand an individually effective remedy for every constitutional violation." *Zehner v. Trigg*, 133 F.3d 459, 462 (7th Cir. 1997). Damages are not available for constitutional violations when the defendants are governmental officials protected by qualified immunity. *Id.* Similarly, as the District of Columbia Circuit has noted, damages may be unavailable for constitutional violations where Congress has provided an alternative set of remedies. *Davis*, 158 F.3d at 1346 (citing *Bush v. Lucas*, 462 U.S. 367 (1983)). *Davis* held that the claim there for compensatory damages was directly barred by § 1997e(e) because the plaintiff alleged no compensable injury. 158 F.3d at 1348.

In sum, the restriction on damages of 42 U.S.C. § 1997e(e) does not violate plaintiff's right of access to the courts or otherwise run afoul of constitutional restrictions. Thus the refusal to give the instruction requiring proof of physical injury, before any damages for mental or emotional injury could be awarded, was error.

III

Defendant contends that the district judge abused her discretion by refusing to permit defendant to call two witnesses in rebuttal. They purportedly would have testified to having seen plaintiff eating non-kosher food and

to having heard announcements for the Jewish call out. Defendant contends that this was admissible impeachment evidence because the plaintiff had testified that he sincerely wished to obey the kosher dietary laws as he understood them and because plaintiff had testified that he was not aware of the existence of a Jewish group at HCF.[4] At trial, the plaintiff objected on the ground that the defendant had failed to disclose the witnesses and the substance of their testimony as required under Fed. R. Civ. P. 26(a)(1)(A), to which the defendant responded that disclosure was not required because the witnesses were rebuttal witnesses whose testimony would impeach the plaintiff's testimony.

The trial judge agreed with plaintiff that the testimony went to an issue which had been identified in the pretrial order. Thus, she held that the identity of the witnesses should have been disclosed and that the testimony would not be allowed because of the failure to comply with the disclosure requirements. The judge further observed that to the extent the testimony was offered only for impeachment, it was inadmissible under Fed. R. Evid. 608(b), which in pertinent part provides that "[s]pecific instances of the conduct of a witness, for the

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[4] Plaintiff asserts that defendant failed to make an offer of proof as required by Fed. R. Evid. 103(a)(2). Although it is true that a formal offer of proof was not made, the record of the parties' arguments to the court sufficiently conveys the substance of the anticipated evidence. The rule does not require an offer to be made if the substance of the evidence was apparent from the context within which the questions were asked.

purpose of attacking or supporting the witness' credibility, . . . may not be proved by extrinsic evidence."

On appeal, the defendant does not address the application of Rule 608(b), even though he continues to argue that the evidence was impeachment evidence. Instead, defendant contends that the evidence was admissible under Fed. R. Evid. 404(b). We see no merit in that argument. Defendant does not explain his reliance on Rule 404(b), nor why he thinks this was evidence of some other "bad act" so as to be within the purview of that rule.

We think the district judge was correct in her ruling. If, as the judge saw it, the evidence was really more than mere impeachment evidence, then the witnesses should have been disclosed. Although a trial judge is not rigidly bound to exclude all evidence as a sanction for failure to fulfill the disclosure requirements, *see Orjias v. Stevenson*, 31 F.3d 995, 1005 (10th Cir. 1994) ("the district court may be found to have abused its discretion if the exclusion of testimony results in fundamental unfairness in the trial of the case"), we see no abuse of discretion in the ruling in this case.[5] If, on the other hand, the evidence was purely

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[5] Defendant contends that the judge should have applied a four part test to determine whether to exclude the evidence after having found a violation of the Rule 26 disclosure requirements. He cites, *inter alia*, *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153 (3d Cir. 1995), and *Smith v. Ford Motor Co.*, 626 F.2d 784, 797 (10th Cir. 1980) (applying the same four factor test to question of whether trial court abused its discretion in admitting testimony not specified in the pretrial order). The issue here arose in the midst of trial, and we certainly do not fault the district judge for not making specific findings in support of her ruling. We are

impeachment evidence, it was inadmissible as extrinsic evidence of specific instances of the plaintiff's conduct under Fed. R. Evid. 608(b).

IV

A

We have determined that the compensatory damages award must be vacated because of the erroneous instruction on damages in violation of § 1997e(e). However, we have found no error in the liability portion of the verdict.[6] We now must determine whether any remedy could be afforded to plaintiff if we were to remand for a partial new trial. In a previous case under section 1997e(e), we

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inclined to believe that the judge probably considered the four factors *sub silentio;* in any event, we find no abuse of discretion in her ruling.

[6] The verdict form clearly reveals the separate determination of the jury on liability and the compensatory award of $3,650. Attachment C to Brief of Appellant, pp. 2-3, states in pertinent part:

> 6. Do you find by a preponderance of the evidence under Instruction No. 14 that defendant Durward VanBebber is liable to plaintiff?
>
> Yes X
>
> No ___
>
> 7. Do you find by a preponderance of the evidence under Instruction No. 19 that Mr. VanBebber caused physical injury to plaintiff?
>
> Yes ___
>
> No X
>
> . . . .

noted that "it is not clear that a claim for either punitive or nominal damages would also be barred. Nominal damages, for instance, are available for the violation of certain 'absolute' constitutional rights, such as due process, without any showing of actual injury." *Perkins v. Kansas Department of Corrections*, 165 F.3d 803, 808 n.6 (10th Cir. 1999) (citing *Carey v. Piphus*, 435 U.S. 247, 266 (1978)).

After some vacillation on this issue, the government has taken the position that nominal damages can be recovered under the statute. Defendant does not address the issue. As the Supreme Court has noted:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. at 266. Because "nominal damages . . . are the appropriate means of 'vindicating' rights

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9. Do you find by a preponderance of the evidence under Instruction No. 14 that Mr. VanBebber caused mental and emotional injuries to plaintiff?

   Yes X

   No ___

whose deprivation has not caused actual, provable injury," *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n. 11 (1986) (citing *Carey*, 435 U.S. at 266), and because the statute does not reveal any attempt to alter that rule with respect to this class of cases, we now hold that section 1997e(e) does not bar recovery of nominal damages for violations of prisoners' rights. *See Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999) (holding that prisoner's complaint for nominal damages for First Amendment violation was not barred by § 1997e(e)).

Moreover, the rule seems to be that an award of nominal damages is mandatory upon a finding of a constitutional violation, as the jury found here. *See Carey v. Piphus*, 435 U.S. 247, 267 (1978); *Farrar v. Hobby*, 506 U.S. 103, 112 (1992); *Risdal v. Halford*, 209 F.3d 1071 (8th Cir. 2000) (plain error to give the jury discretion not to award nominal damages on a finding of a violation of free speech rights); *Norwood v. Bain*, 143 F.3d 843, 856 (4th Cir. 1998), *aff'd in pertinent part en banc*, 166 F.3d 243 (4th Cir.), *cert. denied*, 527 U.S. 1005 (1999).

B

We must now consider issues concerning the award of punitive damages. Because the jury was specifically instructed to consider the amount of actual damages in determining the amount of punitive damages to be awarded, I(B) Aplt. App. 405, and we have determined that the award of actual damages must be vacated because of lack of proof of physical injury, we hold that

the punitive damages award must also be set aside; otherwise the punitive award will rest on impermissible consideration of the improper actual damage award.

We must next decide whether punitive damages may be reconsidered on remand. Defendant contends that the evidence was insufficient to support any award of punitive damages, and alternatively that the determination of liability for punitive damages was against the weight of the evidence. We conclude, however, that the evidence was sufficient for the jury to determine that punitive damages should be awarded. The legal standard for punitive damages in cases under 42 U.S.C. § 1983 is well established. Punitive damages are available only for conduct which is "shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). Whether the evidence was sufficient is a question of law which we review *de novo*. *Deters v. Equifax-Credit Information Serv., Inc.*, 202 F.3d 1262, 1269 (10th Cir. 2000).

The evidence which plaintiff identifies as supporting the award of punitive damages came entirely from Chaplain VanBebber's own testimony. Plaintiff contends that four specific points constitute sufficient evidence from which the jury could conclude that the defendant acted with reckless indifference to his constitutional rights. Brief of Appellee at 36-37. First, despite the fact that defendant received information about and understood plaintiff's claim that he had been on the Jewish call out and had received kosher meals at both the El Dorado and Lansing facilities, defendant never contacted Lansing, and although he did make contact with his counterpart at

El Dorado, he did not inquire whether plaintiff had been receiving kosher meals there. Second, defendant testified that if he had merely asked the question and learned that plaintiff had been on a kosher diet at El Dorado, "there would probably have not been any difficulty, he would have gotten the kosher diet. . . . " I(A) Aplt. App. 240.

Third, defendant did not check plaintiff's file before rejecting plaintiff's request, although the file was available to him, and thus he did not know that plaintiff had completed a change of religion request approximately one year before submitting the request for a kosher diet to which defendant was responding (the third such request plaintiff had submitted since returning to HCF). Fourth, defendant enforced against plaintiff the policy requirement that a prisoner display the sincerity of his beliefs by attending Jewish call out for 90 days before defendant would deem plaintiff eligible for a kosher diet (and did so erroneously in view of plaintiff's history of involvement with the Jewish groups at the previous facilities); yet, defendant did not himself follow the procedures set out in the same policy statement, such as by making a written recommendation to the warden on receipt of plaintiff's request for accommodation of religious practices.

We also note that, although defendant testified that an inmate's history of participation in the activities of a religious group was considered by him to be an indication of the inmate's sincerity of belief, and defendant's own notes showed his awareness that plaintiff had been on the Jewish call out at El Dorado, defendant apparently gave that fact no weight in his decision to deny plaintiff's request. Defendant did not ask plaintiff for any further

information, nor did he attempt to interview plaintiff before denying the request. As to defendant's failure to contact the chaplain at Lansing with respect to plaintiff's request, plaintiff had listed the Lansing chaplain as a reference in support of his request. Also, defendant was unaware of the two requests plaintiff had made to defendant's predecessor in June 1996, although the requests were in plaintiff's "pastoral care" file in the chaplain's office. We also are aware that the Kansas Department of Corrections, in responding to plaintiff's appeal of his administrative grievance, was able to locate the plaintiff's previous change of religion form from August 1995 at El Dorado, a document which was readily available to defendant.

We conclude that a reasonable jury could find from this evidence that defendant's actions were in reckless disregard of plaintiff's rights. Nevertheless, the punitive award must be set aside because of error in the instruction on punitive damages which allowed consideration of the improper actual damages award. On remand, with proper instructions the jury may consider anew the claim for punitive damages as we explain *infra*.

C

Having held that the evidence was sufficient for the jury to consider punitive damages, we will also address whether section 1997e(e) would bar consideration of punitive damages on remand. We note that, as a general rule, punitive damages may be recovered for constitutional violations without a showing of compensable injury. *See Basista v. Weir*, 340 F.2d 74, 87-88 (3d Cir. 1965)

(cited with apparent approval in *Carey*, 435 U.S. at 264, n.22); *Alexander v. Riga*, 208 F.3d 419, 430 (3d Cir. 2000) ("[B]eyond a doubt, punitive damages can be awarded in a civil rights case where a jury finds a constitutional violation, even when the jury has not awarded compensatory or nominal damages."), *cert. denied*, 121 S.Ct. 757 (2001); *see also Louisiana ACORN Fair Housing, Inc. v. LeBlanc*, 211 F.3d 298, 300-304 (5th Cir. 2000) (collecting cases), *cert. denied sub nom. Louisiana ACORN Fair Housing, Inc. v. Lewis*, 69 U.S.L.W. 3269 (March 5, 2001).

Defendant does not argue that punitive damages are prohibited as a matter of law under section 1997e(e). The government has taken the position that punitive damages may be proper in some cases, provided they are "based solely on an alleged constitutional violation, and not on any mental or emotional injury caused by the violation." Supplemental Authority Letter of the Justice Department dated May 18, 2000, at 2. At least one circuit has already held that punitive damages remain available, in the proper circumstances, in prisoner actions under section 1983. *Allah v. Al-Hafeez*, 226 F.3d 247, 251-53 (3d Cir. 2000). We agree. *But see Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998). We believe that the salient fact is that Congress simply did not choose to provide a restriction on punitive damages.

V

In sum, we hold that 42 U.S.C. § 1997e(e) renders invalid the $3,650 award of compensatory damages in this case, due to lack of proof of physical injury, and that the punitive damages of $42,500 must also be stricken

because the jury was instructed to consider the amount of the flawed compensatory damages award in determining the amount of punitive damages. The jury determinations that defendant violated plaintiff's First Amendment rights and, in doing so, acted with the requisite state of mind to support an award of punitive damages, as well as the jury's determination that plaintiff suffered no physical injury from defendant VanBebber, all remain intact. Because the jury has found a constitutional violation, on remand the plaintiff is entitled to an award of nominal damages of one dollar. Therefore, defendant is entitled to a new trial only on the issue of punitive damages. As for the award of attorney's fees, we conclude that it must be vacated and remanded to the district court for reconsideration in light of our rulings and the further proceedings to be had herein.

Accordingly the judgment of the district court is AFFIRMED in part, VACATED in part, and the case is REMANDED for further proceedings in accord with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JIMMY SEARLES,	)	
	)	
Plaintiff,	)	**CIVIL ACTION**
	)	
v.	)	**Case No.**
	)	**96-3515-KHV**
DURWARD A. VANBEBBER, et al.,	)	**(Filed Feb. 19, 1999)**
	)	
Defendants.	)	
	)	

VERDICT

We the jury, duly impaneled and sworn, upon our oaths, present the following answers to the questions submitted by the Court.

1. Do you find by a preponderance of the evidence under Instruction No. 13 that defendant Robert Hannigan is liable to plaintiff?

   Yes _

   No X

2. If so, do you find by a preponderance of the evidence under Instruction No. 19 that Mr. Hannigan caused physical injury to plaintiff?

   Yes _

   No _

3. If so, state the amount of damages that you find Mr. Searles suffered as a result of his physical injuries.

   _____

4. Do you find by a preponderance of the evidence under Instruction No. 19 that Mr. Hannigan caused mental and emotional injuries to plaintiff?

   Yes _

   No X

5. If so, state the amount of damages that you find Mr. Searles suffered as a result of his mental and emotional injuries.

   _____

6. Do you find by a preponderance of the evidence under Instruction No. 14 that defendant Durward VanBebber is liable to plaintiff?

   Yes X

   No _

7. Do you find by a preponderance of the evidence under Instruction No. 19 that Mr. VanBebber caused physical injury to plaintiff?

   Yes _

   No X

8. If so, state the amount of damages that you find Mr. Searles suffered as a result of his physical injuries.

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9. Do you find by a preponderance of the evidence under Instruction No. 19 that Mr. VanBebber caused mental and emotional injuries to plaintiff?

   Yes X

   No _

10. If so, state the amount of damages that you find Mr. Searles suffered as a result of his mental and emotional injuries.

$3,650

11. Do you find by a preponderance of the evidence under Instruction No. 15 that defendant Steven Dechant is liable to plaintiff?

Yes _

No X

12. Do you find by a preponderance of the evidence under Instruction No. 19 that Mr. Dechant caused physical injury to plaintiff?

Yes _

No X

13. If so, state the amount of damages that you find Mr. Searles suffered as a result of his physical injuries.

_____

14. Do you find by a preponderance of the evidence under Instruction No. 19 that Mr. Dechant caused mental and emotional injuries to plaintiff?

Yes _

No X

15. If so, state the amount of damages that you find Mr. Searles suffered as a result of his mental and emotional injuries.

_____

16. If you have found that any defendant violated plaintiff's constitutional rights under Instruction No. 13, Instruction No. 14, or Instruction No. 15, but do not

find that plaintiff suffered physical injury or mental and emotional injuries on account of the violation, do you find by a preponderance of the evidence under Instruction No. 20 that plaintiff is entitled to recover nominal damages?

Yes _

No X

17. If so, state the amount of actual damages which Mr. Searles is entitled to recover.

_____

Answer questions 18 and 19 only if you have found that defendant Hannigan is liable for actual damages under questions 3, 5, or 17 above.

18. Do you find by a preponderance of the evidence under Instruction No. 22 that defendant Hannigan acted with reckless indifference to Mr. Searles' right to free exercise of religion?

Yes _

No X

19. If so, state the amount of punitive damages that you find by a preponderance of the evidence under Instruction No. 22 that defendant Robert Hannigan should pay.

_____

Answer questions 20 and 21 only if you have found that defendant VanBebber is liable for actual damages under questions 8, 10, or 17 above.

20. Do you find by a preponderance of the evidence under Instruction No. 22 that defendant Durward VanBebber acted with reckless indifference to Mr. Searles' right to free exercise of religion?

Yes X

No _

21. If so, state the amount of punitive damages that you find by a preponderance of the evidence under Instruction No. 22 that defendant Durward VanBebber should pay.

$42,500.00

Answer questions 22 and 23 only if you have found that defendant Dechant is liable for actual damages under questions 13, 15, or 17 above.

22. Do you find by a preponderance of the evidence under Instruction No. 22 that defendant Steven Dechant acted with reckless indifference to Mr. Searles' right to free exercise of religion?

Yes _

No X

23. If so, state the amount of punitive damages that you find by a preponderance of the evidence under Instruction No. 22 that defendant Robert Hannigan should pay.

_____

Have your foreperson sign and date the verdict form, and notify the bailiff.

DATE 2-19-99

/s/ [Illegible]
FOREPERSON

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

JUDGMENT IN A CIVIL CASE

JIMMY SEARLES

v.

DURWARD A. VANBEBBER, STEVEN DECHANT, and ROBERT D. HANNIGAN

CIVIL NO. 96-3515-KHV

(Filed Feb. 19, 1999)

(X) **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

( ) **DECISION BY THE COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing and the action is dismissed on the merits as to defendants Steven Dechant and Robert D. Hannigan. Defendants Steven Dechant and Robert D. Hannigan to recover of plaintiff Jimmy Searles their costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Jimmy Searles recover of defendant Durward A. Vanbebber the sum of Three Thousand, Six Hundred Fifty Dollars ($3,650.00) in actual damages and Forty-Two Thousand, Five Hundred Dollars ($42,500.00) in punitive damages, with interest thereon at the rate of 4.584% as provided by law and his costs of action.

Dated: February 19, 1999

RALPH L. DeLOACH, CLERK

/s/ Linda South
Linda South, Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JIMMY SEARLES, Plaintiff-Appellee, v. DURWARD A. VAN BEBBER, Administrative Chaplain, Hutchinson Correctional Facility, Defendant-Appellant. UNITED STATES OF AMERICA, Intervenor-Amicus Curiae.	Nos. 99-3076

ORDER
Filed August 2, 2001

Before **BRORBY, HOLLOWAY** AND **BRISCOE**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ [Illegible]
Deputy Clerk